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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 36

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER FRED T. MACKEY

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APPENDIX

In the United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 18168
FRANK ZIZZO,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

September 9, 1970

Before SWYGERT, *Chief Circuit Judge,* MURRAH, *Senior Circuit Judge*[1] and CAMPBELL, *Senior District Judge.*[2]

CAMPBELL, *District Judge.* This cause comes before this court on petitioner's appeal from an order of the district court denying his motion presented pursuant to 28 U.S.C. §2255 and other post conviction relief provisions[3], seeking to vacate a prior imposed sentence and judgment of conviction.

Petitioner ("Zizzo") and three co-defendants were convicted of traveling in interstate commerce with the intent to promote, manage or carry on etc., an unlawful activity,

[1] Senior Circuit Judge Murrah of the United States Court of Appeals for the Tenth Circuit is sitting by designation.

[2] Senior District Judge Campbell of the Northern District of Illinois is sitting by designation.

[3] In the alternative of relief under §2255, petitioner sought relief in the nature of error coram nobis or for relief under rule 35, F.R.Cr.P. or under 28 U.S.C. §1651.

to wit, a gambling business illegal under the laws of the State of Indiana. 18 U.S.C. §1952 and 18 U.S.C. §2. The evidence in the case established that Zizzo operated a gambling business at various addresses in the State of Indiana. The government's proof against Zizzo also established that he employed three persons (co-defendants) in his gambling business who were residents of Illinois. The government's successful theory in convicting Zizzo was that his gambling operations in Indiana were the inducement for the interstate travel of his employees who were living in Illinois, and that he thus aided and abetted these three co-defendants in their travel and in their engaging in illicit gambling operations in Indiana.

In the course of his trial and over his objection federal wagering tax forms signed and filed by him as required by federal law (26 U.S.C. §§4401, 4411 and 4412) were introduced into evidence. His conviction was affirmed by this court. *United States* v. *Zizzo,* 338 F.2d 577 (1964). In affirming, this court rejected the contention that the use of the wagering tax forms and returns as evidence in his case violated Zizzo's privilege against self incrimination, citing *Lewis* v. *United States,* 348 U.S. 419 (1955); and *United States* v. *Kahriger,* 345 U.S. 22 (1953).These cases have since been overruled. *Marchetti* v. *United States,* 390 U.S. 39 (1968); and *Grosso* v. *United States,* 390 U.S. 62 (1968). In support of his motion to vacate his conviction, Zizzo contends that the rationale of the *Marchetti* and *Grosso* decisions should be applied retroactively and requires, under the facts of this case, that his conviction be vacated. In opposing petitioner's motion the government argues first that *Marchetti* and *Grosso* should not be given retroactive effect, and in the alternative, that their retroactive effect should not be applied to the facts of this case.

As to the retroactive effect of the *Marchetti* and *Grosso* decisions, we first note that the Supreme Court has not yet ruled on this question although the issue is presently before the Court in a number of cases which are awaiting argument. See *United States* v. *United States Coin and Currency,* Oct. Term, 1970 docket No. 5 and *Mackey* v. *United States,* Oct. Term, 1970 docket No. 36. Without attempting to predict how the Supreme Court may decide

ment made by the Government in the case at bar that the wagering tax returns "were not of great significance", and at worst their admission in evidence was harmless error (see Paragraphs I. of the Summary of Argument and Argument at pp. 12 and 15 respectively of the Brief for the United States).

We would further point out that Chief Circuit Judge Swygert, who sat on the panel which decided *Zizzo,* also sat on the panel which affirmed Petitioner's conviction in the original income tax evasion trial; *United States* v. *Mackey,* No. 14584, 7 Cir., 345 F. 2d 499 (1965).

It should be further noted that the Court's effort to distinguish *Mackey* from *Zizzo* is clearly erroneous in the light of this Court's decision in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, which held that statements or the fruits of statements coerced from a person in violation of his privilege against self-incrimination cannot be used "in any manner by Federal officials" in connection with a criminal prosecution against the witness (see Reply for Petitioner, pp. 19-23); and see *United States* v. *Tiktin,* 6 Cir., 427 F. 2d 1027 (1970) Celebreeze C. J., dissenting opinion); petition for a writ of certiorari filed *sub. nom. Tiktin* v. *United States,* No. 369, October Term, 1970.

Respectfully submitted,

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In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

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UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

September 9, 1970

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of the constitutional privilege against self incrimination." *United States* v. *Lookretis*, 398 F.2d 64, 65 (1968).

Here, too, we believe that the disclosures compelled by petitioner's compliance with the wagering tax statutes are inadmissbile over his assertion of his privilege against self incrimination and their admission in this case must void his conviction. Although the *Lookretis* case was not complicated by the retroactive question, we believe the result we reach here logically follows our conclusion above that *Marchetti* and *Grosso* are to be applied retroactively. We also take note that our distinctions of *Mackey* and our reliance on *Lookretis* are similar in approach to the position taken by the Solicitor General in the brief for the United States filed before the Supreme Court in the *Mackey* case. In discussing the limits of the application of *Marchetti* and *Grosso*, the Solicitor General states:

> "Although the Court did not decide the question in *Marchetti* and *Grosso*, the introduction of wagering tax forms against a gambler in a prosecution for violation of a statute that is part of the 'comprehensive system of federal and state prohibtions against wagering activities' (*Marchetti* v. *United States, supra*, 390 U.S. at 48) presumably would be barred by the privilege against self-incrimination. See *United States* v. *Lookretis*, 398 F.2d 64 (C.A. 7). This result would seem to follow because such a statute is one of those that led the Court to conclude that the privilege could be asserted as a defense to the charge of failing to pay the occupational or excise tax on gambling, since otherwise incrimination thereunder would potentially result. But the federal income tax laws are not part of that comprehensive statutory system." (Brief, p. 24).

The government attempts to further distinguish *Lookretis* by arguing that the wagering tax returns were introduced only to prove Zizzo's knowledge that his employees resided in Illinois — a fact which may not be essential to the crime. See *United States* v. *Miller*, 379 F.2d 483 (7th Cir. 1967). In other words, the wagering tax returns were "unnecessary to prove the elements of the offense".

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